

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TERRANCE CALDWELL,	§
	§
Defendant Below-	§ No. 367, 2006
Appellant,	§
	§
v.	§ Court Below—Superior Court
	§ of the State of Delaware,
STATE OF DELAWARE,	§ in and for New Castle County
	§ Cr. ID 0509007366
Plaintiff Below-	§
Appellee.	§

Submitted: November 21, 2006

Decided: January 25, 2007

Before **BERGER, JACOBS**, and **RIDGELY**, Justices.

ORDER

This 25th day of January 2007, upon consideration of the appellant's Supreme Court Rule 26(c) brief, his attorney's motion to withdraw, and the State's response thereto, it appears to the Court that:

(1) A Superior Court jury found the defendant-appellant, Terrance Caldwell (Caldwell), guilty of one count each of possession with intent to deliver and possession of drug paraphernalia. The Superior Court sentenced Caldwell on both convictions to a total period of five years plus thirty days at Level incarceration to be suspended after serving three years and thirty days for probation. This is Caldwell's direct appeal.

(2) Caldwell's counsel on appeal has filed a brief and a motion to withdraw pursuant to Rule 26(c). Caldwell's counsel asserts that, based upon a complete and careful examination of the record, there are no arguably appealable issues. By letter, Caldwell's attorney informed him of the provisions of Rule 26(c) and provided Caldwell with a copy of the motion to withdraw and the accompanying brief. Caldwell also was informed of his right to supplement his attorney's presentation. Caldwell has raised several issues for this Court's consideration. The State has responded to Caldwell's points, as well as the position taken by Caldwell's counsel, and has moved to affirm the Superior Court's judgment.

(3) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold: (a) this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims; and (b) this Court must conduct its own review of the record and determine whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.¹

¹ *Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

(4) Caldwell raises six issues for the Court's consideration. First, he contends that the police lacked reasonable suspicion to stop him. Second, he argues that the police lacked probable cause to arrest him. Third, he contends that the evidence against him had been tampered with. Fourth, he argues that his trial counsel was constitutionally ineffective. Fifth, he claims that his arrest was based on illegal profiling. Finally, Caldwell claims that his due process rights were violated because there was no preliminary hearing in his case. Because the Court will not consider a claim of ineffective assistance of counsel for the first time on direct appeal,² the Court will not address Caldwell's fourth argument. We will address his remaining claims.

(5) The record reflects Officer Nicholas Terranova of the Delaware State Police testified at trial that, on the morning of September 10, 2005, he was on routine patrol in a marked police car, driving southbound on South Market Street outside the Wilmington city limits. Terranova testified that the area he was driving through is known as a high crime area. As Terranova was slowing his vehicle in order to make a turn, he saw a man on foot, about 20 feet away, climbing through a hole in a fence bordering the property of the Fairview Inn Motel. The man looked at Terranova and then threw a plastic bag to the ground. Terranova detained the

² *Wright v. State*, 513 A.2d 1310, 1315 (Del. 1986).

man, Caldwell, and retrieved the bag, which was later tested and found to contain 3.83 grams of crack cocaine.

(6) Although Caldwell did not file a motion to suppress before trial, the Superior Court considered the suppression issue after Officer Terranova testified. The trial judge credited Terranova's testimony that Caldwell had discarded the drugs before Terranova had made any attempt to detain him. Given the officer's experience and the reputation of the area for drug dealing, the trial court concluded that it was reasonable for the officer to believe the discarded bag contained drugs. Because the drugs were discarded in plain view before the officer attempted to stop Caldwell, the trial court found probable cause for the officer to arrest him. Thus, the Superior Court concluded that neither the drugs nor the over \$500 seized from Caldwell's person after his arrest were required to be suppressed.

(7) Despite Caldwell's contention to the contrary, Officer Terranova's approach toward Caldwell while in his vehicle did not constitute a seizure of Caldwell under the Fourth Amendment.³ Thus, when Caldwell panicked and tossed the plastic bag that appeared to contain drugs, we conclude that Officer Terranova had reasonable grounds to believe that Caldwell had committed a felony and thus had probable cause to arrest him without a warrant.⁴ Accordingly, we

³ See *Michigan v. Chesternut*, 486 U.S. 567 (1988) (no seizure when police merely drove alongside a pedestrian causing the pedestrian to panic and discard drugs).

⁴ See 11 Del. C. § 1904(b)(1); *Woody v. State*, 765 A.2d 1257, 1266-67 (Del. 2001).

find no merit to either of the first two issues Caldwell raises on appeal. Moreover, since Officer Terranova observed Caldwell discard the drugs, we find no factual basis for Caldwell's claim that his arrest was based on illegal profiling.

(8) With respect to Caldwell's claim of evidence tampering, it is well-established that the State may authenticate physical evidence either by identifying the evidence as that actually involved in the crime or by establishing a chain of custody that identifies the evidence and eliminates any reasonable probability that tampering has occurred.⁵ At trial, Officer Terranova testified that he placed the seized drugs in an envelope and put the envelope in an evidence locker. He identified the envelope at trial. Likewise, the forensic chemist who tested the drugs identified the same envelope as the one he received and tested at the Medical Examiner's office. Under the circumstances, this testimony was sufficient to identify the drug evidence and eliminate any reasonable probability that the drugs had been tampered with.

(9) Caldwell's final claim is that his due process rights were violated because he was not afforded a preliminary hearing. The record reflects, however, that a preliminary hearing was scheduled in Caldwell's case in the Court of Common Pleas on September 10, 2005, but Caldwell failed to appear (apparently because he was arrested and being held on other charges), and the case was

⁵ *Murphy v. State*, 632 A.2d 1150, 1153 (Del. 1993).

transferred to the Superior Court. It was Caldwell's own conduct that led to his failure to appear at the scheduled preliminary hearing. Furthermore, the State subsequently obtained an indictment against Caldwell on October 3, 2005, which superseded Caldwell's right to a preliminary hearing.⁶ Accordingly, we find no merit to Caldwell's claim that his due process rights were violated.

(10) This Court has reviewed the record carefully and has concluded that Caldwell's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Caldwell's counsel has made a conscientious effort to examine the record and the law and has properly determined that Caldwell could not raise a meritorious claim in this appeal.

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED. The motion to withdraw is moot.

BY THE COURT:

/s/ Jack B. Jacobs
Justice

⁶ *Holder v. State*, 692 A.2d 882, 885 (Del. 1997) (noting that "an indictment eliminates the need for a preliminary hearing").